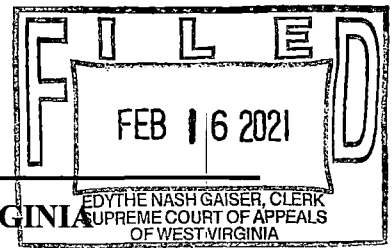


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0090

STATE OF WEST VIRGINIA *ex rel.*
HAROLD RADFORD PORTER,

Petitioner,

v.

The Honorable PAUL T. FARRELL,
Judge of the Circuit Court of
Cabell County, and the
STATE OF WEST VIRGINIA,

Respondents.

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**SUMMARY RESPONSE
OF THE STATE OF WEST VIRGINIA**

On Petition for an Original Jurisdiction Writ of Prohibition

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STATEMENT OF THE CASE

By indictment filed October 31, 2019, the Petitioner was indicted for one count of murder, one count of attempt to commit a felony, *to wit*, murder, and one count of being a person prohibited from possessing a firearm. Pet'r App'x at 1. After a status conference hearing occurring on November 17, 2020,¹ the circuit court entered an Order on November 23, 2020, setting the case for trial on March 1, 2021. Pet'r App'x at 3. On January 7, 2021, the Petitioner filed a *Motion to Dismiss for Failure to Provide Speedy Trial*. Pet'r App'x at 4-5. The Petitioner's motion sought to have the Petitioner's case dismissed under the three-term rule contained in West Virginia Code § 62-3-21. Pet'r App'x at 4. The Petitioner asserted that more than three terms of court had elapsed after the term of his indictment² and that none of the exceptions contained in West Virginia Code § 62-3-21 applied to his case. Pet'r App'x at 4.

The circuit court held a hearing on the motion to dismiss on January 26, 2021. Pet'r App'x at 8-15. At the hearing, the Petitioner's counsel asserted that the Petitioner was indicted in November of 2019. Pet'r App'x at 9. According to the Petitioner, the new term of court commenced on January 5, 2020, and "we're past January 5, 2020, it's '21, so obviously we've been three terms, and there are a few exceptions listed in the statute, none of which are present in this case, so we ask for it to be dismissed." Pet'r App'x at 9. The State did not dispute the Petitioner's recitation of facts, but cited *Lewis v. Henry*, 184 W. Va. 323, 400 S.E.2d 567 (1990) (per curiam), arguing that *Lewis* stood for the proposition that "[d]ifficulties beyond control of Court or litigants along with reasons listed in West Virginia Code § 62-3-21 can constitute good

¹The Petitioner did not include a transcript of this hearing in his Appendix Record. A.R. i.

²Cabell County Circuit Court terms commence the first Monday in January, the first Monday in May, and the Second Tuesday in September. *State v. Carson*, No. 17-0951, 2018 WL 6119790, at *5 (W. Va. Nov. 21, 2018) (memorandum decision).

cause for a continuance.” Pet’r App’x at 9-10. The State asserted that “we’ve all clearly been going through a pandemic which has caused a lot of difficulty.” Pet’r App’x at 10. The State argued that the Covid-19 crisis “constitutes difficulties beyond the control of the Court or the litigants.” Pet’r App’x at 10. The State requested the motion be denied. A.R. 11.

The Petitioner’s counsel responded:

My understanding is that, you know, one of those exceptions has to be in there and none of the exceptions have been met. My understanding is that good cause goes towards the one-term rule and that good cause is not the 62-3-21 rule, that it’s specific in the statute of what it was and it’s not good cause. There are only a few enumerated things that apply.

As to the COVID issue, I mean cases have been tried all throughout last year in the Cabell County Courthouse. And, as a matter of fact, I believe the only time trials were suspended was by order from the Supreme Court back in March of ’20, maybe for approximately a month, and I’m almost positive that order specifically stated though that trials would not be continued if it would affect speedy trial rights.

I mean this is a no-brainer. We’ve never asked for any continuances. Clearly the three terms are up and clearly none of the enumerated factors in the statute are listed. It has to be dismissed.

Pet’r App’x at 11-12.

The circuit court denied the motion to dismiss finding that:

... I believe the courthouse and the Supreme Court stayed all actions from at least March through May.

...

So I’m going to deny the motion based on the unexpected, unpredicted, and uncontrollable COVID things plus Cabell County was shut down for two weeks during Christmas because of COVID.

Pet’r App’x at 12. The circuit court entered a written Order on January 26, 2021, denying the Petitioner’s motion “due to extraordinary COVID-19 conditions.” Pet’r App’x at 7.

The Petitioner filed his Writ of Prohibition with this Court on February 8, 2021 and by Scheduling Order entered February 11, 2021, this Court granted the Petitioner's motion for expedited consideration and directed the State to file a response on or before 12:00 p.m. on February 16, 2021.

ARGUMENT

The circuit court properly found that the Petitioner's trial is not barred by West Virginia Code § 62-3-21 and, as such, a writ of prohibition should not issue.

A. Standards Governing the Writ of Prohibition.

The Petitioner invokes this Court's original jurisdiction asking it to issue a writ of prohibition to prohibit his trial for murder, attempted murder, and prohibited person with a firearm and to forever discharge him from these alleged crimes. The Petitioner in this regard undertakes a heavy burden because a writ of prohibition does not issue lightly from this Court. *State ex rel. AMFM, LLC v. King*, 230 W. Va. 471, 476, 740 S.E.2d 66, 71 (2013). "Thus, a party seeking relief through [prohibition] must navigate a precipitous course and demonstrate his/her entitlement to such an extraordinary remedy. *Id.* at 477, 740 S.E.2d at 72.

"This Court has original jurisdiction in prohibition proceedings pursuant to Art. VIII, § 3, of the Constitution of West Virginia." *State ex rel. W. Va. Nat. Auto Ins. Co. v. Bedell*, 223 W. Va. 222, 226, 672 S.E.2d 358, 362 (2008) (per curiam). "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1. In other words, "[t]he writ of prohibition will issue only in clear cases, where the inferior tribunal is proceeding without, or in excess of, jurisdiction." Syl. *Vineyard v. O'Brien*, 100 W. Va. 163, 130 S.E. 111 (1925). That having been said, "[p]rohibition . . . is an

extraordinary remedy[.]” *State ex rel. Davidson v. Hoke*, 207 W. Va. 332, 335, 532 S.E.2d 50, 53 (2000) (per curiam). “Issuance by the Court of an extraordinary writ is not a matter of right, but of discretion sparingly exercised.” W. Va. R. App. P. 16(a). In regard to the writ of prohibition, this Court has specifically said, “[t]he extraordinary remedy of a writ of prohibition is to be used sparingly.” *State ex rel. Almond v. Rudolph*, 238 W. Va. 289, 294, 794 S.E.2d 10, 15 (2016).

As an extraordinary remedy, prohibition “is a drastic, tightly circumscribed, remedy which should be invoked only in extraordinary situations.” *State ex rel. W. Va. Nat. Auto Ins. Co. v. Bedell*, 223 W. Va. 222, 228, 672 S.E.2d 358, 364 (2008) (per curiam). “Historically, we have limited our exercise of original jurisdiction in prohibition because it is an extraordinary remedy reserved for extraordinary cases.” *State ex rel. Bobrycki v. Hill*, 202 W. Va. 335, 337, 504 S.E.2d 162, 164 (1998) (per curiam). In short, “a writ of prohibition is an extraordinary remedy to be utilized in extremely limited instances.” *State ex rel. Vanderra Res., LLC v. Hummel*, 242 W. Va. 35, 45 n.34, 829 S.E.2d 35, 45 n.34 (2019). “[A] litigant seeking relief through this extraordinary remedy bears a heavy burden and must demonstrate his/her entitlement to the issuance of such a writ[.]” *State ex rel. State Farm Mut. Auto. Ins. Co. v. Marks*, 230 W. Va. 517, 522, 741 S.E.2d 75, 80 (2012) (per curiam). “[T]he right to prohibition must be clearly shown before a petitioner is entitled to this extraordinary remedy.” *Norfolk S. Ry. Co. v. Maynard*, 190 W. Va. 113, 120, 437 S.E.2d 277, 284 (1993); *see also State ex rel. Gordon Mem’l Hosp. v. W. Va. State Bd. of Examiners for Registered Nurses*, 136 W. Va. 88, 104, 66 S.E.2d 1, 10 (1951) (“the writ will issue only in clear cases”). Where a petitioner claims that his speedy trial rights under West Virginia Code § 62-3-21 were violated and seeks relief in prohibition from this Court, the test set forth in Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) provides

the appropriate framework to address the claim. *State ex rel. McCourt v. Alsop*, 220 W. Va. 644, 646–47, 648 S.E.2d 631, 633–34 (2007) (per curiam). Syllabus Point 4 of *Hoover* provides:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

“To justify this extraordinary remedy, the petitioner has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy.” *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 37, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring). Because the circuit court's order denying the Petitioner's Motion to Dismiss was not erroneous, this Court should refuse to issue a prohibition.

B. *Because witnesses for the State were kept away from trial as a consequence of this Court's Judicial Emergency Orders necessitated by Covid-19, the State can demonstrate that the Petitioner's trial set for March 1, 2021 will not affront West Virginia Code § 62-3-21.*

The Petitioner contends that his scheduled trial on March 1, 2021, would violate West Virginia Code § 62-3-21. Pet'n Prohib. at 4. West Virginia Code § 62-3-21 provides, in pertinent part:

Every person charged by . . . indictment with a felony . . . and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the . . . the indictment is found against him, without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from

jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict

West Virginia Code § 62-3-21 is “generally referred to as the ‘three-term rule.’” *State v. Damron*, 213 W. Va. 8, 12, 576 S.E.2d 253, 257 (2002) (per curiam). “[T]he three-term rule, W. Va. Code, 62-3-21, is the legislative adoption or declaration of what ordinarily constitutes a speedy trial within the meaning of U.S. Const., amend. VI and W.Va. Const., art. III, § 14.” *State v. Young*, 167 W. Va. 312, 315, 280 S.E.2d 104, 106 (1981) (footnote omitted). The three-term rule “specifies only five grounds which will toll the three-term rule: (1) defendant’s insanity; (2) State’s witnesses ‘being enticed or kept away’ or ‘prevented from attending by sickness or inevitable accident’; (3) a continuance obtained by the defendant; (4) the defendant’s escape from jail or failure to appear according to his bond; (5) the inability of the jury to agree on their verdict.” *State ex rel. Holstein v. Casey*, 164 W. Va. 460, 469, 265 S.E.2d 530, 535 (1980) (Miller J., dissenting), *majority opinion overruled by State ex rel. Shorter v. Hey*, 170 W. Va. 249, 294 S.E.2d 51 (1981). This Court has not recognized a general good cause exception to the three term rule. Syl. Pt. 4, *Good v. Handlan*, 176 W. Va. 145, 342 S.E.2d 111 (1986). Because the State’s witnesses were “prevented from attending trial by sickness,” *i.e.*, Covid-19, a “highly contagious and potentially deadly illness caused by the novel coronavirus,” *People v. Lucy*, 467 P.3d 332, 334 (Colo. 2020), the Petitioner’s trial set for March 1, 2021, does not affront the three term rule. “Public health concerns trump the right to a speedy trial.” *People v. Tucker*, 128 Cal. Rptr. 3d 267, 267 (Ct. App. 2011).

By Order dated March 22, 2020, this Court declared a judicial emergency in the State of West Virginia. www.courtswv.gov/covid19/JudicialEmergencyDeclared3-22-20.pdf. This Order recited, *inter alia*, “the current COVID-19 crisis creates an unprecedented public health emergency that requires immediate action to encourage effective social distancing and reduce the need for

people to leave their homes to protect the health and safety of the citizens of West Virginia.” *Id.* Thus, the Court implemented the judicial emergency “in order to protect the health and well-being of court employees, litigants, witnesses, jurors, attorneys, and the general public[.]” *Id.* During this judicial emergency, “[a]ll jury trials [were] stayed.” *Id.* The initial judicial emergency was declared to exist between March 23 and April 10, 2020. *Id.*

By Order dated April 3, 2020, this Court extended the judicial emergency until May 1, 2020. www.courtswwv.gov/covid19/JudicialEmergencyDeclaredAmendedOrder4-3-20.pdf. This April 3, 2020 Order again stayed all jury trials during the period of the judicial emergency. *Id.*

By Order dated April 22, 2020, this Court again extended the judicial emergency to May 15, 2020. www.courtswwv.gov/covid19/JudicialEmergencyDeclaredSecondAmendedOrder4-22-20.pdf. This April 22, 2020, Order also stayed all jury trials for the duration of the judicial emergency. *Id.* Indeed, this Court did not authorize the recommencement of jury trials in the State of West Virginia until June 29, 2020. www.courtswwv.gov/covid19/ResumptionOfOperations-ProtocolsandMap5-6-20.pdf.

This Court’s orders suspending jury trials from March 23 to June 29, 2020 are events that constitute excuses for the State not otherwise complying with the three term rule.

“It is not the prerogative of this Court to arbitrarily disregard the plain meaning of clearly written statutes.” *McVey v. Pritt*, 218 W. Va. 537, 540, 625 S.E.2d 299, 302 (2005). Thus, “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). The plain language of West Virginia Code § 62-3-21 excuses from its scope any term of court wherein “witnesses for the State [were] prevented from attending [trial] by sickness[.]” W.

Va. Code § 62-3-21. Here, due to the sickness of Covid-19,³ this Court entered orders staying all jury trials from March 23 to June 29, 2020. Witnesses cannot attend trials that are not occurring and the reason that jury trials were not occurring was because of the deadly and virulent pestilence of Covid-19. Therefore, the State's witnesses were prevented from attending trial by sickness.⁴ Accordingly, there exists a statutory basis excusing the January 2020 and May 2020 terms of court from the ambit of the three term rule.⁵

While the Petitioner acknowledges, as he must, that this Court's orders suspending jury trials "encompassed portions of two of the first three terms of Petitioner's incarceration[.]" Pet'n

³There is no doubt that Covid-19 is a sickness. "COVID-19 is the scourge of the earth. It is a sickness of a lethality and ubiquity unknown for a hundred years." *Fay v. Merrill*, No. HHDCV206130532S, 2020 WL 4815881, at *2 (Conn. Super. Ct. July 22, 2020)).

⁴While a State's witnesses' own illness satisfies the sickness exception to West Virginia Code § 62-3-21, *State v. Ballenger*, No. 16-0986, 2017 WL 5632824, at *3 (W. Va. Nov. 22, 2017) (memorandum decision), the broad language of the sickness exception in the three term rule is not limited to such a circumstance, but applies to excuse any term of court where the State's witness are prevented from attending trial by sickness. The State's witness were prevented from attending trial by Covid-19.

⁵The Petitioner identifies that the Assistant Prosecuting Attorney representing the State in circuit court agreed that none of the exceptions in the three term rule applied. Pet'n Prohib. at 10; A.R. 9. While true, the APA also nevertheless asserted in circuit court that West Virginia Code § 62-3-21 did not bar the Petitioner's trial and argued against the Petitioner's motion. A.R. 10-11. The APA's argument in circuit court does not preclude the State in arguing the proper construction of West Virginia Code § 62-3-21 in this Court. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *State v. Blake*, 197 W. Va. 700, 706 n.10, 478 S.E.2d 550, 556 n.10 (1996) (quoting *United States National Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993) (quoting in turn *Kamen v. Kemper Financial Serv., Inc.*, 500 U.S. 90, 99 (1991))). See also *State v. Jason H.*, 215 W. Va. 439, 446, 599 S.E.2d 862, 869 (2004) (per curiam) (Davis, J., dissenting) (discussing *United States v. Rapone*, 131 F.3d 188 (D.C.Cir.1997)). And, in any event, it is a "well-settled principle that this Court may affirm the judgment of the trial court where it is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the trial court for its judgment." *Barnett v. Wolfolk*, 149 W. Va. 246, 253-54, 140 S.E.2d 466, 471 (1965). Therefore, this Court is not precluded from properly construing the three term rule.

Prohib. at 8, nevertheless, he argues that the suspension of jury trials lasted only ninety-nine days and there were, thus, a remaining two hundred sixty-six days to try the Petitioner. Pet'n Prohib. at 8. The Petitioner's argument does not square with the language of three term rule nor the precedent of this Court dealing with that statute. As such, his claim should be rejected by this Court.

First, "[t]he three term statute, Code, 62-3-21, as amended, provides that an accused is to be discharged from prosecution if three terms of court pass and he is not brought to trial unless a term is excused." *State ex rel. Spadafore v. Fox*, 155 W. Va. 674, 677, 186 S.E.2d 833, 835 (1972). The three term rule contemplates full terms of court and not partial ones. *Ex parte Anderson*, 81 W. Va. 171, 94 S.E. 31, 33 (1917); *see also State ex rel. Shorter v. Hey*, 170 W. Va. 249, 255, 294 S.E.2d 51, 57 (1981) ("at least three full terms of court beyond the term of indictment must pass before, under W. Va. Code, 62-3-21, the constitutional right to a speedy trial is denied."). Thus, if any of the five excusing events as detailed in the three term rule occurs, the whole term of court within which the event occurred is excluded from the three terms that count against the State. A term of court is excused (it is not counted against the three terms within which the State must try a defendant) when one of the five listed events contained in the three term rule occurs within that term of court.

In the instant case, as shown above, this Court's orders suspending jury trials as a result of the Covid-19 crisis constitutes an excusing event under the sickness provision of the three term rule. The Petitioner admits, as he must, that these orders encompassed the first two terms of court

he is trying to count against this State. Pet'n Prohib. at 6-7, 8.⁶ As such, the first two terms of court do not count against the State.⁷

Second, "Courts are obligated to 'presume that a legislature says in a statute what it means and means in a statute what it says there.'" *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 533, 782 S.E.2d 223, 228 (2016) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–254 (1992)). "There is no right in the court to say the Legislature meant anything different from what it has said." *Ex parte Anderson*, 81 W. Va. 171, 94 S.E. 31, 33–34 (1917). The three term rule applies terms of court as the legally determinative temporal period within its scope. The Petitioner cannot substitute days as the controlling period of time for the statutorily mandated period of time under the three term rule is term of court. Consequently, the Petitioner's March 1, 2021, trial date is well within three unexcused terms of court set by West Virginia Code § 62-3-21.

Therefore, the Petition for a Writ of Prohibition should be refused.⁸

⁶The Petitioner argues that criminal trials were occurring in all three terms of Cabell County Circuit Court in 2020. Pet'n Prohib. at 6-7 & n.2. This fact is not germane to this case. As long as the Petitioner's case falls within any one of the five exceptions to the three term rule, then the three term rule is satisfied as to the Petitioner. And in any event, this Court would not be able to take judicial notice as requested by the Petitioner because: (1) whether trials were occurring in Cabell County is not a fact generally known to this Court; (2) the Petitioner has not provided a source in his Appendix Record to this fact, 1 Louis F. Palmer, Jr., *Handbook on Evidence for West Virginia Lawyers* § 201.06[2] (6th ed. 2015); and, (3) an appellate court should not take judicial notice if such notice is to reverse a lower court judgment and judicial notice was not sought in the lower court in the first instance. *Id.*

⁷Further, the circuit court also found that the Cabell County Courthouse was closed for two weeks in December of 2020 due to Covid-19. A.R. 12. Consequently, this closure of the courthouse would also appear to excuse the September 2020 term of court from consideration under the three term rule under the sickness exception of West Virginia Code § 62-3-21. Therefore, it appears no unexcused terms of court have passed in the Petitioner's circuit court case.

⁸This Court granted the Petitioner's motion for expedited relief and by Order entered February 11, 2021, afforded the State only until 12:00 p.m. on February 16, 2021, to respond to the Petition for Prohibition. Given this truncated period (which included a week-end and the President's Day State holiday), the State was compelled to respond to the Petitioner's Petition only by summary

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Prohibition should be refused.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By Counsel,

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response. If this Court issues a Rule to Show Cause, the State respectfully requests that the Rule be accompanied by a further briefing schedule allowing it to file an additional response. *See* W. Va. R. App. Pro. 16(j) (“The rule to show cause may set forth a briefing schedule if additional briefing would assist the Court in deciding the questions presented.”).

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CERTIFICATE OF SERVICE

I, Scott E. Johnson, counsel for the State of West Virginia, the Respondents, hereby certify that I have served a true and accurate copy of the foregoing **Summary Response of the State of West Virginia** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, February 16, 2021, and addressed as follows:

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